

**PLEASE IN PARTICULAR NOTE CLAUSES 6.6 (ADDITIONAL CHARGES), 6.10 AND 6.11 (DELIVERY), 9 (GUARANTEE) AND 10 (LIMITATION OF LIABILITY)**

## **1. DEFINITIONS AND INTERPRETATION**

### **1.1 In these Conditions:**

"**Additional Charges**" means the additional charges provided for by Clause 6.6 (Delivery).

"**Carrier**" means any person who in a contract of carriage undertakes to perform or procure the carriage of the Materials to the Purchaser and any employee, agent or contractor of that person.

"**Company**" means Tarmac Cement & Lime Limited (Company No: 66558).

"**Conditions**" means the conditions set out in this document and includes any special terms and conditions agreed in writing between the Company and the Purchaser.

"**Consumer**" shall have the meaning given to it by the Unfair Contract Terms Act 1977 or the Unfair Terms in Consumer Contracts Regulations 1994.

"**Containers**" means bags, pallets, intermediate bulk containers, mobile silos, rail wagons, or any other products used for the containment, protection, handling, delivery and presentation of the Materials.

"**Contract**" means the contract between the Company and the Purchaser for the sale and purchase of the Materials provided that a "**Scottish Contract**" shall mean a Contract under which the Company supplies Materials from premises in Scotland, and an "**English Contract**" shall mean any Contract other than a Scottish Contract.

"**Contract Price**" means the amount payable by the Purchaser to the Company pursuant to the Contract in respect of the supply of the Materials.

"**Delivery Ticket**" means the proof of delivery/collection ticket to be signed by the Purchaser and returned to the Company setting out various details including the Purchaser's details and a description of the product type and quantity, delivery date and purchase order number (and which includes reference to and acknowledgment of these Conditions).

"**Destination**" means the site and the point of unloading for the Materials.

"**Materials**" means any goods and materials agreed in the Contract to be supplied by the Company to the Purchaser (including any part or parts of them). "**Party**" means a party to the Contract.

"**Purchaser**" means the person, firm or company who purchases the Materials from the Company.

"**Third Party**" means any person other than the Purchaser or the Company.

"**Working Day**" means a day other than Saturday, Sunday and (in the case of an English Contract) a public holiday in England, and (in the case of a Scottish Contract) a public holiday in Scotland.

- 1.2 English Contracts shall be governed by the laws of England and Wales. Scottish Contracts shall be governed by the laws of Scotland. The Parties agree that the courts of England and Wales shall have non-exclusive jurisdiction to settle any dispute which arises in connection with the Contract.
- 1.3 Condition headings are for convenience only and do not affect interpretation.
- 1.4 A reference to a particular law is a reference to it as it is in force for the time being taking account of any amendment extension, application or re-enactment and including any subordinate legislation for the time being in force made under it.
- 1.5 Words in the singular include the plural and in the plural include the singular.
- 1.6 These Conditions shall apply to any replacement Materials supplied by the Company under any Contract.

## **2. FORMATION OF CONTRACT, QUOTATIONS AND ORDERS**

- 2.1 All Materials sold by the Company shall be subject to these Conditions, and any Contract shall be on the basis of these Conditions, to the exclusion of all other terms and conditions (including any terms and conditions which the Purchaser purports to apply under any purchase order, confirmation of order or similar document).
- 2.2 Any amendment or variation to these Conditions shall have no effect unless expressly agreed in writing and signed by a Director of the Company and the Purchaser cannot cancel or vary the whole or any part of the Contract except with the written agreement of an authorised employee of the Company.
- 2.3 Subject to Clause 10.3.4 (Limitation of Liability) below, the Purchaser acknowledges that it has not relied on any statement, promise or representation in relation to the Materials made or given by or on behalf of the Company either before or after the date of the Contract which is not set out in the Contract.
- 2.4 All samples, drawings, descriptive matter, specifications and advertising issued by the Company and any descriptions or illustrations contained in the Company's literature or web sites are issued or published for the sole purpose of giving approximate product information in relation to the materials and goods described in them. They shall not form part of the Contract or be treated as a description of the Materials unless expressly stated in writing as doing so in the Contract. No Materials are sold by sample.
- 2.5 Any quotation or estimate issued by the Company may be withdrawn at any time before the Company accepts the Purchaser's order in accordance with clause 3.1 and shall be deemed to be withdrawn if an order is not received within 30 days of its date.

- 2.6 A quotation or estimate does not constitute an offer to supply the Materials on any other basis than a Contract incorporating these Conditions and no contract shall exist until there has been an order from the Purchaser which has been accepted by the Company in accordance with clause 3.1 and any such order shall be deemed to be an offer by the Purchaser to buy the Materials subject to these Conditions. For the avoidance of doubt, any call-off order on a Contract which differs from the negotiated Contract shall, to the extent accepted by the Company in accordance with Condition 3.1, be deemed to be part of the Contract and subject to these Conditions.
- 2.7 The quantity, quality, description and specification of the Materials shall be as set out in the Company's Delivery Ticket or where there is no Delivery Ticket as set out in the Company's quotation.
- 2.8 The Company reserves the right to make any change to the specification of the Material which does not materially affect their quality and performance or which is required by a particular law.

### **3. ORDERS, SPECIFICATIONS, SAMPLING AND TESTING**

- 3.1 No order submitted by the Purchaser shall be deemed to be accepted by the Company until the earlier of an acknowledgement of order being dispatched to the Purchaser, or the Materials being delivered or dispatched to the Purchaser or made available to the Purchaser for collection.
- 3.2 The Purchaser shall be responsible to the Company for ensuring the accuracy of the terms of any order (including any applicable specification) submitted by the Purchaser and for giving the Company any necessary information relating to the Materials within a sufficient time to enable the Company to perform the Contract in accordance with its terms.
- 3.3 **THE ATTENTION OF THE PURCHASER IS SPECIFICALLY DRAWN TO THE NEED FOR CARE IN THE HANDLING OF THE MATERIALS WHICH ARE IRRITANTS AND CAN CAUSE SKIN DISEASES ALLERGIC REACTIONS AND BURNS. GUIDANCE IS GIVEN IN THE COMPANY'S CHEMICAL SAFETY DATA SHEET.** The attention of the Purchaser is drawn to the provisions of Section 6 of the Health and Safety at Work etc Act 1974, (as amended) (the "Act"). The Company gives notice to the Purchaser that the Company has available information, (including chemical safety data sheets) and product literature concerning the conditions necessary to ensure that, as far as is reasonably practicable, the Materials supplied will be safe and without risks to health when properly used, handled, processed, stored or transported by a person at work. If the Purchaser is not already in possession of such literature or requires any information or advice in connection with the safe use of the Materials at work the Purchaser should immediately contact the Company.
- 3.4 The Purchaser hereby undertakes pursuant to section 6(8) of the Act to take such measures as are communicated in writing to it and take such other steps as are sufficient to ensure, so far as is reasonably practicable, that the Materials will be safe and without risk to health at all times when they are being used, handled, processed, stored or transported by a person at work and shall not use them or permit them to be used without regard to any relevant information or advice relating to their use which has been communicated to the Purchaser pursuant to these Conditions.

- 3.5 The Purchaser shall indemnify and keep indemnified the Company in respect of any liability, monetary penalty or fine in respect of or in connection with the Materials incurred directly or indirectly by the Company under the Act or any regulation order or direction made thereunder or any other instrument relating to health and safety.
- 3.6 For Materials specified in the Contract as supplied to European standards, evaluation of conformity of the Materials with such standards, including any sampling and testing, shall be carried out in accordance with the relevant procedures set out in those standards. For Materials specified in the Contract as supplied to other standards, sampling and testing of the Materials and interpretation of results shall be carried out in accordance with the relevant provisions of such other standards (as notified by the Company to the Purchaser) or other relevant specification (and in the absence of any appropriate specification, in accordance with the Company's instructions).

#### **4. PRICE**

- 4.1 Unless otherwise agreed by the Company in writing, the Contract Price for the Material shall be the price quoted by the Company. Where no price has been quoted by the Company, deliveries will be made at the Company's prices ruling either at the time the order is accepted by the Company, the date of delivery or collection (whichever is the earlier).
- 4.2 The Contract Prices may be increased or decreased at any time by the Company upon giving notice to the Purchaser.
- 4.3 Clauses 4.1 and 4.2 shall override any other provision relating to price in any quotation or estimate given by the Company.
- 4.4 The Contract Price shall be subject to the addition of VAT and a sum equal to any other government duty, tax or levy applicable to the Materials, any ingredient of the Materials or applicable to the sale of the Materials and any other applicable taxes and of any Additional Charge, all of which amounts the Purchaser shall pay as part of the Contract Price for the Materials.
- 4.5 Where specified, an additional charge as deposit for returnable Containers may be levied.

#### **5. PAYMENT**

- 5.1 Payment is due before delivery if required by the Company at the time of entering into the Contract. In all other cases, payment of the Contract Price for the Materials shall be made in pounds sterling in cleared funds on or before the last banking day of the month following the month of delivery of the Materials to the Purchaser, or their collection by or on behalf of the Purchaser (the "**Final Date for Payment**").
- 5.2 Time for payment shall be of the essence and notwithstanding any other condition all payments payable to the Company under the Contract shall become due immediately on its termination.
- 5.3 The Purchaser shall make all payments due under the Contract without deduction for set off, counterclaim, abatement or otherwise.

- 5.4 The Company reserves the right to insist upon payment by the Purchaser for any Materials by way of cleared funds before supply of Materials notwithstanding any subsisting agreement to provide credit to the Purchaser.
- 5.5 If the Purchaser fails to make payment of all or part of the Contract Price in accordance with the Contract then the Contract Price and any payment due on any account between the Company and the Purchaser shall become immediately payable by the Purchaser and the Company shall be entitled to do one or more of the following (without prejudice to any other right or remedy it may have):
- 5.5.1 require payment in cleared funds in advance of delivery of undelivered Materials;
  - 5.5.2 cancel or suspend any further delivery of Materials to the Purchaser under any Contract; or
  - 5.5.3 sell or otherwise dispose of any Materials which are the subject of any Contract with the Purchaser.
- 5.6 Where any payments or sums due to the Company under this Contract are not paid by the Final Date for Payment then the payments or sums remaining due shall carry an interest rate of 4% per annum above Barclays Bank Plc base rate in force from time to time from the Final Date for Payment until the date on which the payment is made. The Company reserves the right to claim interest under the Late Payment of Commercial Debts (Interest) Act 1998.

## **6. DELIVERY**

- 6.1 The Purchaser shall ensure that the Company has reasonable prior notice (being a minimum of 2 Working Days) of the required time and date of delivery, and where the Materials are being delivered, that the Company (or its Carrier) is given sufficient particulars of the agreed Destination. Failing agreement, delivery of the Materials shall be at the Company's premises.
- 6.2 Where delivery of the Materials is to take place at the Company's premises:
- 6.2.1 the vehicle in which the Purchaser, its employees, agents or sub-contractors collect the Materials shall be as specified by the Company; and
  - 6.2.2 whilst at the Company's premises, the Purchaser, its employees, agents, and sub-contractors must obey the Company's site rules and instructions of the Company's duly authorised representative; and
  - 6.2.3 the Purchaser will be responsible for the condition of the vehicle which it, its employees, agents or sub-contractors collect the Materials (whether owned or hired) and the Company shall not be liable in any way (including, without limitation, for negligence) for loss or contamination of the Materials resulting from the condition of such vehicle; and
  - 6.2.4 delivery shall take place into the vehicle in which the Purchaser its employees, agents or sub-contractors collect the Materials, at the Destination at the Company's premises as directed by the Company's duly authorised representative; and

- 6.2.5 the Purchaser shall indemnify the Company for any loss, damage or injury to the Company, its employees or agents or sub-contractors, its plant and equipment caused by the Purchaser, its employees or agents or sub-contractors, the Purchaser's vehicle, or that of its agent or sub-contractor, or the condition thereof.
- 6.3 Delivery will be deemed to take place either when the Purchaser is notified that the Materials are available for collection or at the time of arrival at the Destination. If the Company or its Carrier is unable to deliver because of inadequate instructions, or the Purchaser wrongly fails to take delivery of the Materials, delivery is deemed to take place at the time when the Company has tendered delivery of the Materials.
- 6.4 The Company shall use all reasonable efforts to comply with any time or date given or agreed by the Company for delivery of the Materials, but any aforesaid dates and times are intended for guidance purposes only and shall not be of essence, and shall not be capable of being made of the essence by notice from the Purchaser. If no times or dates are specified, the Materials shall be delivered within a reasonable time of the acceptance of the order.
- 6.5 The Company may deliver the Materials by means of separate instalment and each instalment shall be invoiced and paid for in accordance with the Contract. Each instalment shall for the purpose of delivery be treated as a separate supply and a failure to deliver any instalment or any claim by the Purchaser in respect of any instalment shall not entitle the Purchaser to repudiate, cancel or terminate the Contract.
- 6.6 Without prejudice to any other rights or remedy available to the Company an Additional Charge may be made if:
- 6.6.1 the Purchaser incurs any of the additional charges set out on the relevant Company quotation;
  - 6.6.2 delivery is notified outside the Company's normal working hours or on a bank or public holiday;
  - 6.6.3 the Purchaser re-directs or fails to take a delivery, fails to give sufficient delivery instructions, or its failure to obtain appropriate licences or authorisations or prevents or delays delivery;
  - 6.6.4 the Purchaser returns part of the delivery having failed to accept the full ordered quantity of Materials;
  - 6.6.5 the unloading of the delivery vehicle is delayed for more than 30 minutes;
  - 6.6.6 the delivery is aborted due to unsuitable access to the Destination;
  - 6.6.7 the Purchaser requires delivery of the Materials in quantities less than the Company's minimum load, or of different types of Materials on one vehicle;
  - 6.6.8 unused Materials are returned to the Company for disposal; or
  - 6.6.9 the Company provides day work services to the Purchaser.

- 6.7 The Purchaser shall provide suitable facilities for unloading, reception and storage of the Materials. The Company or its Carrier shall be entitled to refuse to deliver over roads or over ground or to any premises facilities or equipment which it considers unsuitable. The Purchaser hereby indemnifies the Company (and/or its Carrier) against any accident or damage (excepting death and personal injury caused by the Company or its Carrier's negligence) occurring due to unsuitable access or inadequate unloading equipment or labour.
- 6.8 The Purchaser shall be responsible for supervising completion of delivery. The Purchaser indemnifies the Company (both for itself and as agent and trustee for any Carrier) against all losses, costs, proceedings, claims, demands and expenses incurred by it or by any such Carrier (other than in respect of death or personal injury caused by the negligence or breach of duty (as defined in Section 25 of the Unfair Contract Terms Act 1977 (as amended) ("UCTA")) of the Company or its Carrier) as a result of failure to provide such convenient and safe access or discharge point and/or properly supervised delivery and/or failure to provide suitable facilities for the unloading, reception and storage of the Materials as aforesaid.
- 6.9 If the Materials are to be left on a street or public highway the Purchaser is responsible for compliance with all regulations and for all steps required to ensure the protection at all times of persons or property and shall indemnify the Company against all damages, costs, claims, losses or expenses which the Company may incur as a result of such delivery.
- 6.10 The Company shall not be liable for any loss or damages whatsoever whether direct, indirect or consequential (including, for the avoidance of doubt, any liability to any Third Party, pure economic loss, loss of profits, loss of business, and loss of goodwill), costs, charges or expenses resulting from any delay in the delivery of the Materials, or failure to deliver the Materials within a reasonable time (whether such delay or failure is caused by the Company's negligence or otherwise), nor shall any delay or failure entitle the Purchaser to terminate or rescind the Contract unless it continues for 30 days or more.
- 6.11 Should the Purchaser not terminate or rescind the Contract under Clause 6.10 then any liability of the Company for continued non-delivery shall be limited to either:
- 6.11.1 delivery of the Materials within a reasonable time; or
  - 6.11.2 issuing a credit note at the pro rata Contract Price in respect of any Materials which have not been delivered.
- 6.12 In addition, in the case of supplies by rail:
- 6.12.1 the Purchaser shall ensure that rail wagons are properly unloaded at the Destination agreed in accordance with Condition 6.1 and that the locomotive and rail wagons are not damaged in unloading. If unloading of a rail wagon is delayed beyond the time specified in Condition 6.6.5, or is prevented, either totally or partially, from unloading at the discharge point by any reason arising out of or in connection with an act or omission of the Purchaser, its employees agents, or sub-contractors, the Company may require the return of the rail wagon to its premises and in such event the Purchaser shall reimburse the Company any additional costs and expenses reasonably and properly incurred by the Company in returning such rail wagon to its

premises and shall pay a further charge (as notified by the Company to the Purchaser from time to time) in respect of each period of 24 hours (or part thereof) during which the rail wagon is unavailable for other use by the Company; and

- 6.12.2 the Purchaser irrevocably and unconditionally indemnifies and keeps indemnified the Company against all losses, costs (including legal costs), expenses, claims, demands, penalties and damages (other than in respect of death or personal injury caused by the negligence or breach of duty (as defined in Section 25 of UCTA) of the Company, its employees, agents or subcontractors) which the Company incurs as a result of any damage to a rail wagon arising out of or in connection with any act, neglect or default (including negligence) by the Purchaser, its employees, agents or subcontractors; and
- 6.12.3 the Purchaser shall co-operate with the Company and assist the Company as may be reasonably required in respect of scheduling haulage by rail; and
- 6.12.4 detaining the Company's rail wagons for more than 24 hours may be charged to the Purchaser at the rail operating company's scale for demurrage in force at the time such detention ceases; and
- 6.12.5 if the Purchaser is entitled to reject any Materials, the Purchaser must reject the entire contents of the relevant rail wagon; and
- 6.12.6 in the event that the Company has agreed that delivery of the Materials shall be by rail and delivery is not possible (for whatever reason) the Company may deliver the Materials by road and the Purchaser shall comply with the provisions of these Conditions in relation to delivery by road.

## 7. INSPECTION AND SHORTAGES

- 7.1 The Company shall use reasonable endeavours to supply the quantity of Materials provided for by the Contract and to notify the Purchaser of any surplus or shortfall in the quantity of Materials delivered. Subject to Clause 7.2, if a surplus or shortfall occurs the Company shall discuss with the Purchaser the possible options to resolve the surplus or shortfall and the Purchaser shall not be entitled to object to or reject the Materials (or part) by reason of any such surplus or shortfall. If the Company delivers more or less than the quantity of Materials ordered, a pro rata adjustment shall be made to the invoice for the Materials if appropriate.
- 7.2 If the Purchaser has a claim for short delivery it must telephone the Company as soon as reasonably practicable and shall then advise the Company in writing within 48 hours of delivery (the "**Notice Procedure**") of any such claim.
- 7.3 If the Notice Procedure is not followed the Materials will be deemed to have been delivered in the quantities shown on the Delivery Ticket or where there is no Delivery Ticket containing such details on the consignment note and the Purchaser shall not be entitled to make a claim in respect of an alleged shortfall in the Material.
- 7.4 Subject to Clauses 7.2 and 7.3 above, the Company's liability for any shortfall is limited to:
  - 7.4.1 making good the shortfall within a reasonable time; or



7.4.2 issuing a credit note for the shortfall at the pro rata Contract Price.

## **8. RISK AND TITLE**

8.1 Risk in the Materials shall pass to the Purchaser:

8.1.1 in the case of Materials to be delivered at the Company's premises, at the moment of discharge at the Destination on the Company's premises into or onto the vehicle in which the Purchaser, its employees, agents or sub-contractors collect the Materials or at the moment when the Company notifies the Purchaser that the Materials are available for collection; and

8.1.2 in the case of Materials to be delivered otherwise than at the Company's Premises, at the moment of their discharge or offloading from the Company's or Carrier's vehicle at the Destination or if the Purchaser wrongly fails to take delivery of the Materials, at the time when the Company tendered delivery of the Materials.

8.2 Ownership of the Materials shall not pass to the Purchaser until the Company has received payment in cleared funds of all sums owed by the Purchaser to the Company under the Contract.

8.3 Until ownership passes to the Purchaser, or the Purchaser has used the Materials in the ordinary course of its business, the Purchaser shall:

8.3.1 hold the Materials as the Company's fiduciary agent and bailee; and

8.3.2 keep (at no cost to the Company) the Materials separately and safely stored satisfactorily protected and identified as the Company's property.

8.4 Until ownership passes to the Purchaser, the Purchaser shall be entitled to resell at full market value or use the Materials in the ordinary course of its business but any such sale shall be a sale of the Company's property on the Purchaser's own behalf and the Purchaser shall deal as principal when making such a sale and account to the Company for the proceeds of sale.

8.5 The Company shall be entitled to recover payment for the Materials (including VAT, other taxes and Additional Charges or other charges) even though the ownership of any of the Materials has not passed from the Company.

8.6 The Company shall be entitled at any time to inspect or recover any or all of the Materials in the Purchaser's possession to which the Company has title and for that purpose the Purchaser permits the Company or its servants or agents to enter upon any premises occupied by the Purchaser or to which the Purchaser has access and where the Materials may be or are believed to be situated.

8.7 On termination of the Contract, the Company's rights in this Clause 8 shall remain in effect.

## **9. THE GUARANTEE**

- 9.1 If the Purchaser can establish to the reasonable satisfaction of the Company that the Materials are not in accordance with the quality or specification contained in the Contract then, subject to the remaining provisions of this Condition 9 and Condition 10, the Company shall at its sole discretion supply to the Purchaser additional Materials in the same quantity as the defective or non-compliant Materials and which in all respects are in accordance with the Contract or refund all or part (as appropriate) of the price of the relevant Materials (the “**Guarantee**”).
- 9.2 The Guarantee is subject to the following limitations:
- 9.2.1 the Guarantee shall not apply unless the Purchaser notifies the Company in writing of the alleged defect or failure immediately upon its first becoming aware thereof and in any event within 48 hours of delivery of the Materials; or, where the defect or failure was not apparent on reasonable inspection, within 48 hours after the earlier of the discovery of the defect or failure by the Purchaser, its employees, agents or sub-contractors or the time when the defect or failure ought reasonably to have been discovered by the Purchaser, its employees, agents or sub-contractors;
  - 9.2.2 in relation to cement Materials, the Company will accept no responsibility for the strength or other quality of its Materials if the Purchaser shall have added anything whatsoever to them (other than as directed by the Company);
  - 9.2.3 the Company will accept no responsibility for faults in or failure of the Materials due to methods of mixing adopted by the Purchaser or inadequate curing;
  - 9.2.4 the Company will accept no responsibility for faults in or failure of the Materials due to placing adopted by the Purchaser, or the effects of frost, heat or inclement weather;
  - 9.2.5 the Company will accept no responsibility if the defect or failure in respect of the Materials results from incorrect specification or other data supplied by the Purchaser to the Company;
  - 9.2.6 save in respect of death or personal injury caused by the negligence or breach of duty (as defined in section 25 of UCTA) of the Company, the Company shall have no liability whatsoever, whether in contract, tort or delict (including negligence) or otherwise for the presence of any lignite or other deleterious material in any of the aggregates contained in the Materials;
  - 9.2.7 since all cement and related products exhibit some volume change upon hardening, no responsibility can be accepted by the Company, whether in contract, tort or delict (including negligence) or otherwise, for any loss or damage arising as a result of such changes.
- 9.3 The Purchaser shall provide to the Company, its employees and agents (together with such vehicles, plant and equipment as the Company shall deem necessary) safe and unrestricted access together with such other facilities and information as the Company may reasonably require to enable it to ascertain or verify the nature and cause of the alleged defect or failure and to carry out its obligations under the Guarantee **PROVIDED ALWAYS THAT** the Company shall be under no obligation whatsoever to refund the price of, or supply

additional materials in respect of, any Materials which are removed by the Purchaser without the Company's prior written consent or where the Company has not been given proper opportunity to ascertain or verify the nature and cause of the alleged defect in accordance with this Condition 9.3.

- 9.4 The Company shall be entitled to require the Purchaser by notice in writing to cease forthwith the use of any of the Materials in respect of which any alleged defect or failure has been notified to the Company and if the Purchaser fails to comply with such requirement the Company shall be under no liability to the Purchaser either under this Condition or otherwise in relation to such Materials. Notwithstanding this, the Company shall not be liable for any damages or losses whatsoever suffered by the Purchaser to the extent that they are caused by the continued use of the Materials after a defect or failure became apparent, or ought to have become apparent, to the Purchaser, its employees, agents or sub-contractors.
- 9.5 The Company shall be under no obligation whatsoever to refund the price of the Materials or supply any additional Materials to the Purchaser pursuant to the Guarantee where the alleged defect or failure results from incorrect installation or handling, alteration without consent, wear and tear, accident, failure to observe the sampling or testing procedures referred to in Condition 3, abnormal or improper conditions of storage or use or any act, neglect or default (including negligence) of the Purchaser or any third party.
- 9.6 Subject to Conditions 9.1 to 9.5, additional materials supplied pursuant to the Guarantee shall be delivered to the Purchaser at the address at which the defective Materials were located.

## **10. LIMITATION OF LIABILITY**

- 10.1 Save for where the Contract provides specific remedies to the Purchaser in respect of delay under Clauses 6.10 and 6.11 (Delivery), short delivery under Clause 7.4 (Inspection and Shortages), the following provisions set out the total liability of the Company (including any liability for the acts or omissions of its employees, agents and subcontractors) for other loss and damage suffered by the Purchaser in respect of:
- 10.1.1 any breach of contract;
- 10.1.2 any use made or resale by the Purchaser of the Materials, or any product incorporating the Materials; and
- 10.1.3 any representation, statement or tortious act or omission including negligence arising under or in connection with the Contract or the supply of the Materials.
- 10.2 All warranties, conditions and other terms implied by statute or common law which may be excluded by law (save for the conditions implied by Section 12 of the Sale of Goods Act 1979) are, to the fullest extent permitted by law, excluded from the Contract.
- 10.3 Nothing in these Conditions shall exclude or restrict the Company's liability:
- 10.3.1 for death or personal injury resulting from the Company's negligence;

- 10.3.2 under Section 2(3) of the Consumer Protection Act 1987;
- 10.3.3 for any matter which it would be unlawful for the Company to exclude or attempt to exclude its liability; or
- 10.3.4 for fraud or fraudulent misrepresentation.
- 10.4 Subject to Clauses 10.2 and 10.3:
- 10.4.1 The Company's total liability in contract, tort or delict (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance of or contemplated performance of the Contract and the supply of the Materials shall be limited to a maximum financial cap of the lesser of:
- i) £50,000.00; and
  - ii) a sum equivalent to the Contract Price.
- 10.4.2 The Company shall not be liable to the Purchaser for any:
- iii) pure economic loss;
  - iv) loss of profits;
  - v) loss of business;
  - vi) loss of goodwill; or
  - vii) claims for consequential costs, charges, expenditure or compensation (whether direct or indirect and including legal costs) which arise out of or in connection with the Contract.
- 10.5 The Company shall have no liability for any defect to the extent that the loss or damage suffered by the Purchaser or any Third Party arises from:
- 10.5.1 normal wear and tear;
- 10.5.2 the Purchaser's or a Third Party's wilful damage, negligence, abnormal working practice, misuse, alteration or repair of the Materials, failure to follow any British Standard or Company or industry instructions relevant to the Materials; or
- 10.5.3 failure to comply with the recommended conditions for the storage of the Materials set out in Clause 12 (Recommended Shelf Life and Conditions for Storage).
- 10.6 If the Materials are manufactured processed or mixed by the Company to the specification of the Purchaser or its agents, the Purchaser fully indemnifies the Company against all loss, damages, costs, and direct and indirect economic loss or expenses on an indemnity basis awarded against or incurred by the Company in settlement of any claim for infringement of any patents copyright design trademark or any other industrial or intellectual property rights of any Third Party.

10.7 The Purchaser also fully indemnifies the Company against all loss, damages, costs and expenses on an indemnity basis awarded against or incurred by the Company in connection with or paid or agreed to be paid by the Company in settlement of any other claim arising from any such manufacturing, processing or mixing described in Clause 10.6. The indemnity will be reduced in proportion to the extent that such loss, damages, costs and expenses are due to the negligence of the Company.

10.8 The statutory rights of a Purchaser dealing as a Consumer are not affected by these Conditions.

## **11. FORCE MAJEURE**

11.1 The Company may defer delivery, terminate the Contract or reduce the volume of Materials delivered to the Purchaser and shall not be liable to the Purchaser or be deemed to be in breach of the Contract by reason of the aforesaid delay, termination, or reduced delivery or any failure to perform any of the Company's obligations where it was due to any cause beyond the Company's reasonable control (a "**Force Majeure Event**").

11.2 If the Force Majeure Event in question continues for a continuous period in excess of 90 days, either Party may give notice in writing to the other terminating the Contract.

## **12. RECOMMENDED SHELF LIFE AND CONDITIONS FOR STORAGE**

12.1 The Company shall use reasonable endeavours to deliver Materials to the Purchaser as soon after the date of manufacture as possible and in any event before the expiry of the recommended shelf life.

12.2 The Company shall have no liability to the Purchaser for the use of Materials following the expiry of the recommended shelf life or if the Materials are not stored in the recommended conditions as notified by the Company to the Purchaser.

## **13. DEFAULT**

13.1 If the Purchaser:

- a) fails to make any payment to the Company on the due date;
- b) suspends, or threatens to suspend, payment of its debts, or is unable to pay its debts as they fall due or admits inability to pay its debts;
- c) exceeds any agreed credit limit;
- d) commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts;
- e) has a petition filed, notice given, resolution passed, or order made, for or in connection with its winding up or bankruptcy;

- f) is the subject of an application to court or order for the appointment of an administrator;
- g) has a receiver or an administrative receiver appointed over any of its assets; or
- h) is in breach of any term of this Contract and fails to remedy such breach within 14 days of being so requested to do so,  
then the full balance outstanding on any account between the Company and the Purchaser shall become immediately payable and the Company shall be entitled to do one or more of the following (without prejudice to any other right or remedy it may have):
  - i) require payment in cash or cleared funds in advance of delivery of any undelivered Materials;
  - ii) cancel or suspend any further delivery to the Purchaser under any Contract; and/or
  - iii) sell or otherwise dispose of any Materials which are the subject of any Contract.

13.2 Termination of the Contract, however arising, shall not affect any of the Parties' rights and remedies that have accrued as at termination. Clauses which expressly or by implication survive termination of the Contract shall continue in full force and effect.

#### **14. CONTAINERS**

14.1 The Purchaser shall pay a deposit in respect of each Container, as specified by the Company from time to time. Containers remain the property of the Company at all times. The Purchaser must return them or make them available for return as soon as possible to the place indicated by the Company empty, securely closed, free from any residual materials, substances, products or other waste and in good order. The Purchaser shall indemnify the Company against all costs, claims, losses or expenses (including legal expenses) on an indemnity basis (other than in respect of death or personal injury caused by the negligence or breach of duty (as defined in Section 25 of UCTA) of the Company or its Carrier) which the Company may incur as a result of a breach of this Condition 14.1.

14.2 Where Containers are not returned or not returned in good order the Company shall be entitled to make a charge for damage or loss equal to the repair or replacement cost (as appropriate) of such Containers.

14.3 Where Containers are not returned or made available for return within 30 days of the date of delivery the Company shall be entitled to enter the Purchaser's premises to locate and recover Containers and the Purchaser grants the Company a licence for such purposes and agrees to indemnify the Company in respect of the Company's costs of locating and recovering such Containers.

14.4 The Purchaser shall be entitled to receive, by way of a credit note, an agreed proportion of any deposit paid in respect of Containers where Containers are returned in accordance with these conditions.

#### **15. GENERAL**

- 15.1 **Recording of Telephone Calls:** The Company reserves the right to record all telephone orders and enquiries and shall comply in all respects with the Data Protection Act 1998 in respect of such information.
- 15.2 **Entire Agreement:** The Contract constitutes the entire agreement between the Parties and supersedes and extinguishes any previous arrangement, understanding or agreement between them relating to the subject matter of this Contract. The Purchaser acknowledges that it has not relied on any statement, promise or representation made or given by or on behalf of the Company which is not set out in the Contract.
- 15.3 **Severance:** If any Clause or sub-clause of these Conditions is held by any court or other authority of competent jurisdiction to be wholly or partly void or unenforceable the validity of the other Clauses or sub-clauses of these Conditions shall not be affected and they shall remain in full force and effect. If any invalid, unenforceable or illegal provision of the Contract would be valid, enforceable and legal if some part of it were deleted, the provision shall apply with the minimum modification necessary to make it legal, valid and enforceable.
- 15.4 **Assignment:** The Company may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under the Contract. The Purchaser may not assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Contract without the prior written consent of the Company.
- 15.5 **Waiver:** A waiver of any right or remedy under the Contract is only effective if given in writing and shall not be deemed a waiver of any subsequent breach or default. No failure or delay by a party to exercise any right or remedy provided under the Contract or by law shall constitute a waiver of that or any other right or remedy, nor shall it preclude or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall preclude or restrict the further exercise of that or any other right or remedy.
- 15.6 **Third Party Rights:** The Parties to the Contract do not intend that any term of the Contract shall be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person that is not party to it.
- 15.7 **Notice:** Any notice by either Party to the other shall be in writing addressed to that other Party at its registered office or principal place of business or such other address as notified to the Party giving the notice. Notices shall be deemed to have been received 48 hours after posting (exclusive of the day of posting) if sent by first class post; on the day of delivery by hand; or at the time of transmission if sent by facsimile or e-mail.
- 15.8 **Trade Mark Notice:** "Tarmac" and the 'circle' logo are registered trademarks. They may not be used by third parties except under licence. Any use of the word Tarmac and the 'circle' logo will be deemed to be under licence from the Company which the Company may terminate at any time by written notice.